

**EVIDENCE — IDENTIFICATION — DESSUREAULT — Pretrial publicity as affecting witnesses' identification — Revised 3/2010**

In *State v. Atwood*, 171 Ariz. 576, 832 P.2d 593 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001), Atwood kidnaped, raped, and murdered an eight-year-old girl in Tucson. "The victim's abduction became an immediate media sensation in the Tucson area," and "the press continued to devote significant coverage to the case, with defendant's arrest and subsequent prosecution receiving particular attention." *Id.* at 602, 832 P.2d at 619. This coverage included photographs of Atwood being arrested and transported in handcuffs; close-up photos of his face; videotapes of his arrest and his return to Tucson; extensive videotaped coverage of his court hearings, including voice-overs identifying Atwood as "the suspect" and "the defendant," and newspaper articles with Atwood's photograph, with frequent references to his prior convictions and parole status, as well as discussions of the evidence against him. The trial judge would later remark, "To live in Pima County and avoid exposure to this coverage would have required one to be a hermit living in a cave." *Id.* Before trial, Atwood moved to suppress the identification testimony of all 14 witnesses, "claiming that some might have been subject to improperly suggestive identification procedures and that all had been tainted by pretrial publicity." *Id.* The trial court held an eleven-day *Dessureault* hearing<sup>(1)</sup> and found that all of the witnesses had been exposed to one or more pretrial viewings of Atwood "under circumstances that were inherently suggestive." *Id.* The trial court found that none of the witnesses could be free of the various suggestive circumstances. Relying on *Manson v. Braithwaite*, 432 U.S. 98, 113-114 (1977); *Neil v. Biggers*, 409 U.S. 188, (1972); *Simmons v. United*

*States*, 390 U.S. 377 (1968); and *Stovall v. Denno*, 388 U.S. 293 (1967), the trial court then applied the "totality of the circumstances" analysis to determine whether admitting the various identifications would violate Atwood's constitutional right to due process. Based on its analysis, the court suppressed the identification testimony of two witnesses but allowed the remaining twelve witnesses to testify about identifying Atwood.

On appeal, Atwood claimed that the trial court erred by not suppressing all of the witnesses' identifications. The Arizona Supreme Court noted that "We review a trial court's decision on a motion to suppress under a 'clear abuse of discretion' standard," *Atwood*, 171 Ariz. at 603, 832 P.2d at 620, *citing State v. Fisher*, 141 Ariz. 227, 236, 686 P.2d 750, 759 (1984). While the Court noted that there was "no unnecessarily suggestive government identification procedures," the Court stated that "we do not believe that unnecessarily suggestive government identification procedures are a sine qua non of due process concerns. Rather, we believe that 'reliability is the linchpin in determining the admissibility of identification testimony,'" *Id.*, *citing and quoting Manson v. Braithwaite*, 432 U.S. at 114. The Court found that the trial court properly considered the factors bearing on each witness's reliability and found that while two witnesses were not reliable, the other twelve were sufficiently reliable so that their evidence could be admitted. The Court found that the trial court had not erred in allowing the twelve witnesses to testify.

1. *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969).